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No. 05-1629

IN THE

Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL
Petitioner,

v.

LUIS ALEXANDER DUENAS-ALVAREZ,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a "theft offense," which is an "aggravated felony" under the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(G), includes aiding and abetting.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Luis Alexander Duenas-Alvarez files this brief in opposition to the petition for a writ of certiorari filed by Alberto R. Gonzales, Attorney General.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The decisions of the Board of Immigration Appeals (Pet. App. 3a) and the Immigration Judge (Pet. App. 4a-10a) are also unreported.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. The Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(G), defines "aggravated felony" to include "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year."

2. The California Vehicle Code provides in relevant part:

> Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense ....

Cal. Veh. Code § 10851(a).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. § 1227(a)(2), provides that aliens who have been convicted of certain types of offenses, including aggravated felonies, are removable. The INA provides a list of offenses that qualify as aggravated felonies. *See* 8 U.S.C. § 1101(a)(43). This list includes "a theft offense (including receipt of stolen property) ... for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(G).

Taylor v. *United States*, 495 U.S. 575, 599-602 (1990), sets forth the two-part test that courts apply in determining whether a conviction under a particular statute qualifies as a conviction for the relevant offense under the INA.[1] The first

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[1] *Taylor* concerned the question whether an offense was a "burglary" for purposes of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e), but courts have applied the same analytical framework in this context. *See, e.g., Soliman* v. *Gonzales*, 419 F.3d 276, 284 (4th Cir. 2005); *Ye* v. *INS*, 214 F.3d 1128, 1132-1133 (9th Cir. 2000).

step—the "categorical" approach—asks whether all conduct covered by the statute of conviction falls within the "generic" definition of the relevant offense (i.e., "the generic sense in which the term is now used in the criminal codes of most States," *id.* at 598). If the statute of conviction is entirely within the generic definition, then the conviction qualifies categorically as the relevant offense. If the statute of conviction is broader than the generic definition, however, then the court moves to the second step—the "modified categorical" approach. Under this step, the court reviews certain documents in the case to determine whether the particular offense of which the defendant has been convicted falls within the scope of the generic definition.

2. Duenas-Alvarez, a native and citizen of Peru, became a lawful permanent resident of the United States in January 1998. Pet. App. 7a. In 2004, the Department of Homeland Security (DHS) initiated removal proceedings against Duenas-Alvarez, charging him with removability under two sections of the INA. DHS alleged that Duenas-Alvarez was removable pursuant to § 237(a)(2)(A)(i) of the INA, 8 U.S.C. § 1227(a)(2)(A)(i), for having been convicted of a crime involving moral turpitude. Pet. App. 4a-5a. DHS also alleged that Duenas-Alvarez was removable under § 237(a)(2)(A)(iii) of the INA, 8 U.S.C. § 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony, namely a theft offense for which the term of imprisonment is at least one year, 8 U.S.C. § 1101(a)(43)(G). Pet. App. 4a-5a.

Both charges of removability were based on Duenas-Alvarez's 2002 conviction under California Vehicle Code § 10851(a) for the unlawful driving or taking of a vehicle. Duenas-Alvarez had been charged in the Superior Court under § 10851(a), pled guilty to the charge, and was sentenced to three years of imprisonment. Pet. App. 7a-8a.

3. In proceedings before the Immigration Judge (IJ), Duenas-Alvarez argued that the California offense of unlawful driving or taking of a vehicle under § 10851(a) was neither a crime involving moral turpitude under 8 U.S.C. § 1227(a)(2)(A)(i), nor an aggravated felony under 8 U.S.C.

§ 1101(a)(43)(G). Pet. App. 23a-24a. The IJ agreed with Duenas-Alvarez that the crime was not a crime involving moral turpitude, but determined that it was a "theft offense," and thus an aggravated felony, under the INA. *Id.* at 8a-9a. Accordingly, the IJ ordered Duenas-Alvarez removed to Peru. *Id.* at 10a.

Duenas-Alvarez appealed this decision to the Board of Immigration Appeals (BIA), reiterating his argument that the crime of unlawful driving or taking of a vehicle under California Vehicle Code § 10851(a) was not a "theft offense," and thus not an aggravated felony within the meaning of 8 U.S.C. § 1101(a)(43)(G). Pet. App. 18a-22a. The BIA dismissed Duenas-Alvarez's appeal, adopting the decision of the IJ that Duenas-Alvarez's conviction under § 10851(a) "constitutes an aggravated felony." *Id.* at 3a. Duenas-Alvarez then petitioned for review in the Ninth Circuit.

4. While his petition was pending, the Ninth Circuit issued its decision in *Penuliar* v. *Ashcroft*, 395 F.3d 1037 (2005), *amended*, 435 F.3d 961 (9th Cir.), *petition for cert. filed*, 75 U.S.L.W. 3001 (June 22, 2006) (No. 05-1630). Penuliar was charged with removability based in part on a conviction for unlawful taking or driving of a vehicle under California Vehicle Code § 10851(a).[2] The question before the Ninth Circuit was whether this conviction qualified as a "theft offense" under the INA.

The original decision applied the two-step analysis under *Taylor* in making this determination. The court first observed that, for purposes of the generic definition, the Ninth Circuit defines "theft offense" as "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." 395 F.3d at 1044 (quotation omitted).

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[2] The charge of removability was also based on Penuliar's conviction for evading an officer under California Vehicle Code § 2800.2(a). That aspect of the Ninth Circuit's holding is not at issue in this case and was not addressed by the petition for certiorari in *Penuliar*.

The court found that California Vehicle Code § 10851(a) is "broader than the generic definition of a 'theft offense.'" 395 F.3d at 1044. It reasoned that the language of the statute "makes plain" that it includes "accessory or accomplice liability," *id.*; the statute expressly includes individuals who are a "party or an accessory to or an accomplice in the driving or unauthorized taking or stealing" of a vehicle, Cal. Veh. Code § 10851(a). Accordingly, § 10851(a) "does not categorically qualify as a 'theft offense' within the meaning of 8 U.S.C. § 1101(a)(43)(G)." 395 F.3d at 1044-1045.

Under the modified categorical approach, the court held that the IJ erred in finding that Penuliar had been convicted of a "theft offense." 395 F.3d at 1046. Accordingly, the court granted the petition for review. *Id.*

The Government filed a petition for panel rehearing and rehearing en banc. The petition argued that § 10851(a) qualifies as an aggravated felony because aiding and abetting is within the generic definition of "theft offense." Reh'g Pet. 4-12. The petition also contended that Penuliar had failed to exhaust his administrative remedies by failing to present to the BIA the claim that the offenses of conviction were not aggravated felonies. *Id.* at 12-13.

The Ninth Circuit denied the petition for rehearing and issued an amended opinion. 435 F.3d 961. The opinion remained largely the same, but, as relevant here, included a new footnote responding to the Government's argument regarding aiding and abetting liability. Specifically, the court concluded that the Government's assertion "is foreclosed by our decision in *Martinez-Perez* [v. *Gonzales*, 417 F.3d 1022, 1028 (9th Cir. 2005)] (holding that a conviction for grand theft under California Penal Code § 487(c) was not a 'theft offense' within the meaning of the INA because a defendant could 'be convicted of a substantive violation . . . based on an aiding and abetting theory alone')." 435 F.3d at 970 n.6.

5. After the amended decision in *Penuliar* issued, the Ninth Circuit granted Duenas-Alvarez's petition for review. Pet. App. 1a-2a. The court noted that the IJ had held that Duenas-Alvarez's conviction for unlawful driving or taking

of a vehicle "categorically met the definition of a theft offense." *Id.* at 2a. Because the Ninth Circuit had recently held in *Penuliar* that "a violation of Section 10851(a) does not categorically qualify as a theft offense because that section is broader than the generic definition," the court "remand[ed] th[e] petition to the [BIA] for further proceedings in light of *Penuliar*." *Id.*

REASONS FOR DENYING THE PETITION

The petition for certiorari is based on an erroneous reading of *Penuliar* and mistaken assumptions about California law. In the Government's view, *Penuliar* held that the generic definition of "theft offense" does not include aiding and abetting liability. The Government argues that certiorari must be granted because this holding is incorrect, conflicts with decisions in other circuit courts, and threatens to have far-reaching consequences on the immigration system. Pet. 6.[3] None of these arguments warrants review of the question presented or any other aspect of this case or *Penuliar*.

The Government's critical error lies in misapprehending the distinction between "aiding and abetting" liability, on the one hand, and "accessory" liability, on the other. The statute at issue, California Vehicle Code § 10851(a), explicitly covers "accessory" liability; under California law, the term "accessory" is defined to refer to accessories after the fact (and is distinguishable from aiders and abettors), *compare* Cal. Penal Code § 32 *with* Cal. Penal Code § 31. *Penuliar* held that because § 10851(a) reaches accessories after the fact, it exceeded the scope of the generic definition of

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[3] The Government also notes (Pet. 23-25) that this case is a better vehicle for addressing the question presented than *Penuliar*. The Government is correct that, unlike *Penuliar*, this case will not entail consideration of the preliminary question whether respondent exhausted his administrative remedies. However, regardless of vehicle problems, certiorari is not warranted in either case—all the reasons presented by respondent to deny this petition apply equally well to the petition filed in *Penuliar*.

"theft offense." Contrary to the Government's view, the holding of *Penuliar* does not rest on the proposition that aiding and abetting liability is not included in the generic definition of "theft offense."

Once this misunderstanding of *Penuliar* and California law is corrected, it is clear that certiorari is not warranted in this case or *Penuliar*. A decision by this Court on the question presented—regarding aiding and abetting liability—would have no effect on the outcome of this case; *Penuliar*'s central holding regarding accessory liability would remain intact. For similar reasons, the supposed circuit split identified by the Government does not exist; the cases cited as allegedly conflicting with *Penuliar* address aiding and abetting liability, not accessories after the fact.

Certiorari should be denied for the additional reason that the Ninth Circuit's ultimate holding—that California Vehicle Code § 10851(a) is not a categorical "theft offense"—is correct. This is so even if the Court accepts the Government's view of *Penuliar*, as there is an alternate ground for affirmance. As noted, § 10851(a) reaches accessories after the fact. And accessories after the fact are undoubtedly beyond the scope of the generic definition of "theft offense": under the laws of all fifty states, the District of Columbia, and the federal government, accessories after the fact are *not* liable for the crime of the principal. Nor do modern theft statutes indicate that they reach the conduct of an accessory after the fact. Thus, regardless of the Court's understanding of *Penuliar* or its views on the question presented, the outcome of this case and *Penuliar* is correct.

Finally, this Court's review would be premature: On June 29, 2006—after the Government filed its petitions in this case and in *Penuliar*—the Ninth Circuit granted en banc review in *United States* v. *Vidal*, 426 F.3d 1011 (9th Cir. 2005). *See* 453 F.3d 1114 (9th Cir. 2006). *Vidal* addresses the scope of liability under California Vehicle Code § 10851(a) and considers whether that statute qualifies categorically as a "theft offense" for purposes of the United States Sentencing Guidelines. The en banc court's decision

will bear on questions at issue in this case, such as whether § 10851(a)'s inclusion of accessory after the fact liability means that it is not a categorical "theft offense." Because the Ninth Circuit has not yet come to rest on the scope of § 10851(a) relative to the generic definition of "theft offense," the petition for certiorari should be denied.

I. THE GOVERNMENT MISCONSTRUES *PENULIAR* BECAUSE IT FAILS TO RECOGNIZE THE DISTINCTION BETWEEN "AIDING AND ABETTING" AND "ACCESSORY AFTER THE FACT" LIABILITY

The Government's petition for certiorari erroneously collapses two distinct categories: "aiding and abetting" liability, on the one hand, and "accessory after the fact" liability, on the other. As a result, the Government misconstrues the holding of *Penuliar*.

The underlying issue in *Penuliar* and in this case was whether, under step one of *Taylor*, California Vehicle Code § 10851(a) categorically qualifies as a "theft offense" and, in turn, as an "aggravated felony" under the INA. The resolution of this question, the Government concedes (Pet. 3) depends upon whether § 10851(a) reaches conduct that is not included in the generic definition of "theft offense." Although the Government is correct that the Ninth Circuit held that the California vehicle theft statute did not qualify categorically as a "theft offense" under the INA, the Government is mistaken as to the reason for this holding.

The statute at issue, California Vehicle Code § 10851, expressly covers "accessory" liability. California law defines "accessory" as an accessory after the fact. *See* Cal. Penal Code § 32; *see also* n.6, *infra*. *Penuliar* considered whether, in light of the liability of accessories, the statute was broader than the generic definition of "theft offense." The court held that a conviction under § 10851(a) is not a categorical "theft offense"; § 10851(a) is broader than the generic definition of "theft offense" under 8 U.S.C. § 1101(a)(43)(G) because "[a]s the statute makes plain," § 10851(a) includes accessory liability. 395 F.3d at 1044.

In the Government's view (and despite the court's express consideration of the term "accessory"), the court's holding instead rests on the conclusions that § 10851(a) encompasses *aiding and abetting* liability and that aiding and abetting is not covered by the generic definition of "theft offense." Pet. 5. There is a disconnect, however, between the Government's view and the language of the case itself. The Government's reading is especially suspect in light of the fact that the court's original opinion did not discuss aiding and abetting liability under California Vehicle Code § 10851(a) at all. Rather, the court addressed aiding and abetting liability under § 10851(a) in a footnote in its *amended* opinion, in response to the Government's petition for rehearing raising that issue. 435 F.3d at 970 n.6. The addition of this footnote merely reinforces the conclusion that the holding does not pertain to aiding and abetting liability.

The Government's approach to the holding of *Penuliar* appears to stem from its faulty assumption (reflected throughout its petition) that the court's separate analyses of aiding and abetting liability and accessory liability can be collapsed because all the terms mean the same thing. The Government purports to justify this approach to the terms and the *Penuliar* opinion by asserting:

> In modern criminal codes, there is no meaningful distinction among "party," "accessory," "accomplice," and "aider and abettor." *See* 2 Wayne R. LaFave, *Substantive Criminal Law* §§ 13.1-13.2 (2d ed. 2003). The Ninth Circuit appears to have used the terms interchangeably. *See Penuliar*, 435 F.3d at 969-970.

Pet. 7 n.3; *see also* Pet. 7-10.

The Government is simply incorrect. First, the Government is mistaken as to the distinctions modern criminal codes draw with respect to these terms. Indeed, it misapprehends what LaFave's treatise states on this issue. As explained in more detail below, distinctions remain with respect to accessory after the fact liability, even if certain

categories of parties to a crime are treated the same. *See* 2 LaFave § 13.1. Second, and most important, because California law (like the laws of other states and the federal government) draws a distinction regarding accessories after the fact, *see* Cal. Penal Code § 32, *Penuliar* should not be read as using the term interchangeably with aiders and abettors or any other party to a crime.

A. Accessory After The Fact Liability Remains A Distinct Category

At common law, there were multiple categories of parties to a crime: (1) "principal in the first degree; (2) "principal in the second degree," also known an aider and abettor present; (3) "accessory before the fact," also known as an aider and abettor not present; and (4) "accessory after the fact." 2 LaFave § 13.1. In brief, the principal in the first degree is the actor who engages in the criminal act (*id.* § 13.1(a)); principals in the second degree are present at the crime and "aid, counsel, command, or encourage the principal in the first degree in the commission of that offense" (*id.* § 13.1(b)); and the accessory before the fact is not present at the crime but "orders, counsels, encourages, or otherwise aids and abets another to commit a felony" (*id.* § 13.1(c)). By contrast, accessories after the fact are involved only after the crime has been committed and are "not deemed a participant in the felony." *Id.* § 13.1.

As LaFave's treatise notes, modern penal codes have done away with all but one of these distinctions. The distinctions regarding principals and aiders and abettors (present and not present) have been abandoned; these categories of participant "have all played a part in the commission of the crime and are quite appropriately held accountable for its commission." 2 LaFave § 13.6(a). In contrast, however, an accessory after the fact "had no part in causing the crime." *Id.* Instead, the offense of the accessory after the fact is considered to be "that of interfering with the processes of justice and is best dealt with in those terms." *Id.* As de-

scribed in Part III, *infra*, the state criminal codes confirm this view.[4]

Thus, and contrary to the Government's suggestion, there is in fact a "meaningful distinction" between accessory after the fact liability and aiding and abetting liability.

B. The Ninth Circuit Did Not Use The Term "Accessory" Interchangeably With "Aider And Abettor"

In the Government's view, *Penuliar*'s discussion of "accessory" liability should not be taken at face value because the Ninth Circuit "appears to have used the terms [accessory and aider and abettor] interchangeably." Pet. 7 n.3.[5] There is no basis to conclude that this is so.

In fact, under California law, the term "accessory" is a *defined term*, and is manifestly not interchangeable with

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[4] In addition to LaFave's treatise, the Government cites a handful of other authorities for the proposition that all parties to a crime are treated as principals. Most of these concern the proposition that there is no distinction in terms of liability between aiders and abettors and principals. *See, e.g.*, Pet. 8 (quoting *Nye & Nissan* v. *United States*, 336 U.S. 613, 618 (1949) (observing that it is "well engrained in the law" that one who aids or abets the commission of an act "is as responsible for that act as if he committed it directly")). One cited authority expressly refers to accessories, namely *Hammer* v. *United States*, 271 U.S. 620, 628 (1926), which the Government relies upon for the proposition that "by the early twentieth century many statutes had 'abolishe[d] the distinction between principals and accessories.'" Pet. 8 (quoting *Hammer*, 271 U.S. at 628 (alteration in original)). The term "accessories" in that quote, however, refers to accessories *before the fact* and *not accessories after the fact*, like the California statute. *Hammer* explains: "Section 332 [now § 2] of the Criminal Code abolishes the distinction between principals and accessories and makes them all principals. One who induces another to commit perjury is guilty of subornation under section 126, and by force of section 332 (Comp. St. s 10506) is also guilty of perjury." 271 U.S. at 628. Thus, *Hammer* merely confirms that the federal statute treats accessories before the fact (aiders and abettors not present) the same as principals; it does not speak to accessories after the fact. *See also* 18 U.S.C. § 2 (listing aiders and abettors, but not accessories after the fact, as principals).

[5] As support for this proposition, the Government simply cites the pages of the opinion in which the court applied the categorical approach. *See* Pet. 7 n.3 (citing *Penuliar*, 435 F.3d at 969-970).

"aiding and abetting." An "accessory" is defined in § 32 of the California Penal Code, which states that the term applies *only* to accessories after the fact—those who assist the principal *after* the commission of the offense.[6] In contrast, California Penal Code § 31 defines those liable as principal, and includes those who "aid and abet in [the offense's] commission"; it does *not* include accessories after the fact or reach the conduct of accessories after the fact.[7]

Case law in California confirms that "accessories," a term defined in reference to § 32 as accessories after the fact, *see, e.g.*, *People* v. *Coffman*, 96 P.3d 30, 108 (Cal. 2004), are not equivalent to aiders and abettors. In addition to the difference in the offense conduct, accessories are not liable, as aiders and abettors are, for the underlying offense of the principal. *See People* v. *Mitten*, 112 Cal. Rptr. 713, 715 (Cal. Ct. App. 1974) ("[I]n California one who is an accessory to a

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[6] Section 32 of the California Penal Code provides:

> Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.

Indeed, the term "accessory" necessarily invokes § 32 because California has abrogated the distinction between accessories before the fact and principals and between principals in the first and second degree. *See* Cal. Penal Code § 971.

[7] California Penal Code § 31 defines principals as follows:

> WHO ARE PRINCIPALS. All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed.

felony thereby commits a crime which is separate and distinct from the felony itself. The difference is sometimes overlooked. There often seems a tendency to consider the accessory as responsible in some manner for the initial felony. [This is an] erroneous concept."); *People* v. *Nguyen*, 26 Cal. Rptr. 2d 323, 335 (Cal. Ct. App. 1993) ("In contrast [to an aider and abettor], an accessory's criminal liability does not arise out of some manner of responsibility for the commission of the offense."); *cf. People* v. *Horton*, 906 P.2d 478, 506 (Cal. 1995) ("A mere accessory ... is not an accomplice.").

California law thus provides a clear-cut distinction between an "accessory" (i.e., accessory after the fact) and an "aider and abettor" or other party to an offense.[8] This distinction has existed, moreover, since 1872, long before any vehicle statutes were in effect.[9] Accordingly, the Ninth Circuit should not be presumed to have ignored the unambiguous meaning of the term "accessory" in California Vehicle Code § 10851(a) and used the term interchangeably with "aider and abettor." *Penuliar*, properly read, holds that § 10851(a) exceeds the scope of the generic definition of "theft offense" because the statute reaches accessory after the fact liability.

Indeed, one of the members of the *Penuliar* panel has explained that *Penuliar*'s holding pertains to accessory liability. *Vidal*, 426 F.3d at 1014 (discussed in Part IV), concerned the related question whether § 10851(a) categorically qualifies as a "theft offense" for purposes of the United States Sentencing Guidelines. The majority in that case did not reach the question whether the inclusion of accessory liability in that provision rendered it beyond the scope of the

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[8] This distinction is hardly unique to California law. *See* Part III, *infra* (outlining this distinction in state and federal statutes).

[9] In that year, sections 31 and 32 of California Penal Code were first enacted, as was California Penal Code § 971, which abrogated the distinction between principals in the first and second degree and accessories before the fact.

generic definition. *Id.* at 1016.[10] In a dissent, however, Judge Browning addressed this question and, in so doing, provided an overview of California law and insight into *Penuliar*.

Judge Browning explained that "California law does not include 'accessories' (i.e., 'accessories after the fact') as principals." *Vidal*, 426 F.3d at 1018 (Browning, J., concurring in part and dissenting in part). Section 10851(a), he noted, expressly reaches accessories—those "who sufficiently and knowingly aid a principal after the commission of the offense." *Id.* at 1019. "Comparing the statute of conviction to the generic predicate offense definition," Judge Browning deemed it "beyond dispute that, by criminalizing accessories, § 10851(a), covers a broader range of conduct than does the Sentencing Guidelines generic 'theft offense.'" *Id.* Thus, "a conviction under § 10851(a) cannot categorically qualify as a 'theft offense' for sentence enhancement within the meaning of 8 U.S.C. § 1101(a)(43)(G)." *Id.* And for this last proposition, Judge Browning expressly cited *Penuliar*, 395 F.3d at 1044-1045. *Id.*

II. THIS CASE AND *PENULIAR* DO NOT IMPLICATE THE QUESTION PRESENTED AND DO NOT CREATE A CIRCUIT SPLIT

The Government's understanding of the holding in *Penuliar* is premised on the faulty assumption that the court used the term "accessory" interchangeably with "aider and abettor." Once that assumption is discarded, and accessory is given its correct meaning, the arguments for a grant of the petition for a writ of certiorari fall away.

In fact, the question presented does not even pertain to the holding in *Penuliar*. With this petition for certiorari, the Government asks this Court to hold that the generic defini-

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[10] The *Vidal* majority concluded that this issue was not dispositive in light of the outcome under the modified categorical approach. 426 F.3d at 1016 ("this point is neither developed, nor would it make any difference in this case").

tion of "theft offense" reaches aiders and abettors. But, as explained above, *Penuliar* holds that § 10851(a)'s inclusion of liability for accessories—as in accessories after the fact—renders it beyond the scope of the generic definition of "theft offense" under the INA. The decision the Government seeks thus will not alter the outcome of the Ninth Circuit's decision in this case or *Penuliar*. Indeed, it will not even address the central holding of the cases. For that reason, the Court should deny the petition for a writ of certiorari.

For similar reasons, this case does not create or implicate a circuit split. The Government contends there is a four-to-one split, citing cases from the First, Second, Seventh, and Eighth Circuits allegedly in conflict with *Penuliar* and this case.[11] Pet. 11-15. With these cases, the Government is intent on showing that other circuits do not categorically hold that aiding and abetting liability is outside the scope of the generic definition of the relevant crime. These cases, however, are not in conflict with the Ninth Circuit's holding in this case or *Penuliar*. As noted, *Penuliar* held that California Vehicle Code § 10851(a) reached conduct beyond the generic definition of "theft offense" because it included liability for accessories after the fact. None of the cases the Government cites addresses, much less rejects, this conclusion.

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[11] In *United States* v. *Hathaway*, 949 F.2d 609, 610-611 (2d Cir. 1991) (per curiam), the Second Circuit held that aiding and abetting liability is included in the generic definition of arson for purposes of the ACCA. Likewise, *United States* v. *Groce*, 999 F.2d 1189, 1192 (7th Cir. 1993), holds that, within the meaning of the ACCA, the generic definition of burglary "extends to the context of aiding and abetting." *United States* v. *Mitchell*, 23 F.3d 1, 3-4 (1st Cir. 1994) (per curiam), rejected the argument that aiding and abetting arson falls outside the generic definition of crime of violence under the Bail Reform Act of 1984, 18 U.S.C. § 3143(a)(2). And *United States* v. *Baca-Valenzuela*, 118 F.3d 1223, 1232-1233 (8th Cir. 1997), held that aiding and abetting possession of cocaine with the intent to distribute it categorically constitutes "illicit trafficking in any controlled substance" and thus an aggravated felony under the INA.

Nor do footnote six of *Penuliar* or *Martinez-Perez*, 417 F.3d at 1028, the case on which the footnote relied, provide the basis for a circuit split. Given the focus of the court on the "broad" nature of California aiding and abetting liability,[12] *Martinez-Perez* stands for the proposition that the scope of liability under California's grand theft statute exceeds the generic definition of "theft offense" because California aiding and abetting liability is particularly broad—not because the generic definition of theft does not include *any* liability for aiding and abetting at all. Footnote 6 in *Penuliar* reaches the same conclusion for California Vehicle Code § 10851(a).[13] And there is no circuit split on this issue: the cases cited by the Government concern the laws of different states and therefore do not address the scope of aiding and abetting liability under California law.

Yet even assuming, *arguendo*, that footnote six of *Penuliar* does create a split with other circuits (by holding that the generic definition does not include aiding and abetting liability), this split does not provide the basis for a grant of certiorari. The central holding of *Penuliar* is that accessory liability is beyond the scope of the generic definition of "theft offense"; any holding on aiding and abetting liability is, at most, an alternate holding. Thus, review of the aiding and abetting question the Government presents would not ad-

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[12] *Martinez-Perez* observed that "aiding and abetting liability in California 'is quite broad, extending even to promotion and instigation.'" 417 F.3d at 1027 (quoting *United States* v. *Corona-Sanchez*, 291 F.3d 1201, 1208-1209 (9th Cir. 2002)). Thus, the court found that "[b]ecause a defendant can be convicted of the substantive violation of § 487(c) based on an aiding and abetting theory alone, some of the conduct proscribed by § 487(c) falls outside the generic definition of theft offense." *Id.* at 1028.

[13] *Penuliar* also makes reference elsewhere in the opinion to "accomplice[s]," another term that appears in § 10851. 395 F.3d at 1044. While it is unclear why the court also quoted this term, it appears that it is mentioned because the term is listed with accessory liability within California Vehicle Code § 10851(a). Yet even assuming, *arguendo*, that this term is somehow related to the court's holding, the court's accompanying citation of *Martinez-Perez* suggests that, at most, the court was referring to the scope of accomplice liability under California law. *See id.*

dress the central holding of the case and will not affect the outcome. If the Court wishes to review the question presented, it should await a case in which that holding is dispositive.

III. THE NINTH CIRCUIT REACHED THE CORRECT RESULT IN THIS CASE AND IN *PENULIAR*

Supreme Court review in this case or *Penuliar* is unwarranted for the additional reason that the Ninth Circuit reached the correct result. Indeed, even if the Court accepts the Government's view of *Penuliar*, certiorari is not warranted because there is an alternate ground for affirmance. Specifically, California Vehicle Code § 10851(a) expressly reaches accessories after the fact, and accessories after the fact are beyond the reach of the generic definition of "theft offense." Thus, the Ninth Circuit properly concluded that § 10851(a) is not a categorical "theft offense" under the INA.

Under *Taylor*, the categorical inquiry is guided by the "generic definition" of "theft offense." The "generic definition" is meant to be "the generic sense in which the term is now used in the criminal codes of most States." 495 U.S. at 598; *see also* Pet. 6-7. A review of state criminal codes as well as the criminal title of the United States Code makes clear that the generic definition of "theft offense" does *not* reach accessories after the fact.

The criminal codes of all fifty states and the District of Columbia include statutory provisions that define those who are liable for an offense as principal. The Government cites these provisions as evidence that, as in California, "[t]he statutes of every other State (and the District of Columbia) likewise treat aiders and abettors as principals." Pet. 9. The very same statutes, however, do not explicitly include accessories after the fact within the scope of parties liable as principal for the underlying offense, nor do they reach the conduct of an accessory after the fact.[14] Indeed, every state but

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[14] *See* Ala. Code § 13A-2-23; Alaska Stat. § 11.16.110; Ariz. Rev. Stat. Ann. § 13-303; Ark. Code Ann. § 5-2-402; Colo. Rev. Stat. § 18-1-603; Conn.

one[15] addresses those considered at common law as accessories after the fact in entirely separate statutory provisions.[16]

Gen. Stat. Ann. § 53a-8; Del. Code Ann. tit. 11, § 271; D.C. Code § 22-1805; Fla. Stat. Ann. § 777.011; Ga. Code Ann. § 16-2-20; Haw. Rev. Stat. § 124A-112; Idaho Code Ann. § 19-1430; 720 Ill. Comp. Stat. Ann. 5/5-2; Ind. Code Ann. § 35-41-2-4; Iowa Code Ann. § 703.1; Kan. Stat. Ann. § 21-3205; Ky. Rev. Stat. Ann. § 502.020; La. Rev. Stat. Ann. § 14:24; Me. Rev. Stat. Ann. tit. 17-A, § 57; Md. Code Ann., Crim. Proc. § 4-204; Mass. Gen. Laws ch. 274, § 2; Mich. Comp. Laws Ann. § 767.39; Minn. Stat. Ann. § 609.05; Miss. Code Ann. § 97-1-3; Mo. Ann. Stat. § 562.041; Mont. Code Ann. § 45-2-302; Neb. Rev. Stat. Ann. § 28-206; Nev. Rev. Stat. Ann. § 195.020; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; N.M. Stat. Ann. § 30-1-13; N.Y. Penal Law § 20.00; N.C. Gen. Stat. § 14-5.2; N.D. Cent. Code § 12.1-03-01; Ohio Rev. Code Ann. § 2923.03; Okla. Stat. Ann. tit. 21, § 172; Or. Rev. Stat. § 161.155; 18 Pa. Cons. Stat. Ann. § 306; R.I. Gen. Laws § 11-1-3; S.C. Code Ann. § 16-1-40; S.D. Codified Laws § 22-3-3; Tenn. Code Ann. § 39-11-402; Tex. Penal Code Ann. § 7.02; Utah Code Ann. § 76-2-202; Vt. Stat. Ann. tit. 13, § 3; Va. Code Ann. § 18.2-18; Wash. Rev. Code Ann. § 9A.08.020; W. Va. Code Ann. § 61-11-6; Wis. Stat. Ann. § 939.05; Wyo. Stat. Ann. § 6-1-201.

[15] West Virginia contrasts those parties liable as principal—all principals and accessories before the fact—with accessories after the fact, who may be "confined in jail not more than one year and fined not exceeding five hundred dollars," in the same provision. W. Va. Code Ann. § 61-11-6.

[16] Respondent sets forth the relevant state and District of Columbia statutes herein. Some states use the label "accessory after the fact," and some, like California, employ the term "accessory" to refer to accessories after the fact. In other states, the offense of accessory after the fact currently "is characterized as 'hindering' apprehension or prosecution, or is otherwise described to reflect its true character as a crime involving interference with the process of government." 2 LaFave § 13.6(a) (footnote omitted).

Ala. Code § 13A-10-42 (hindering prosecution or apprehension); Alaska Stat. § 11.56.770 (hindering prosecution); Ariz. Rev. Stat. Ann. § 13-2510 (hindering prosecution); Ark. Code § 5-54-105 (hindering apprehension or prosecution); Cal. Penal Code § 32 (accessories); Colo. Rev. Stat. § 18-8-105 (accessory to crime); Conn. Gen. Stat. Ann. § 53a-165 (hindering prosecution); Del. Code Ann. tit. 11, § 1244 (hindering prosecution); D.C. Code § 22-1806 (accessories after the fact); Fla. Stat. Ann. § 777.03 (accessory after the fact); Ga. Code Ann. § 16-10-50 (hindering the apprehension or punishment of a criminal); Haw. Rev. Stat. § 710-1028 (hindering prosecution); Idaho Code Ann. § 18-205 (accessories); 720 Ill. Comp. Stat. Ann. 5/31-4 (obstructing justice); Ind. Code Ann. § 35-44-3-2 (assist-

The approach in the statutes of all fifty states and the District of Columbia to those liable as principal, on the one hand, and to accessories after the fact, on the other, reflects the fact that accessories after the fact are not liable as principal for the underlying offense. Lest there be any doubt about this proposition, the case law in at least forty states

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ing a criminal); Iowa Code Ann. § 703.3 (accessory after the fact); Kan. Stat. Ann. § 21-3812 (aiding a felon); Ky. Rev. Stat. Ann. § 520.120 (hindering prosecution or apprehension); La. Rev. Stat. Ann. § 14:25 (accessories after the fact); Me. Rev. Stat. Ann. tit. 17-A, § 753 (hindering apprehension or prosecution); Md. Code Ann., Crim. Proc. § 1-301 (accessory after the fact); Mass. Gen. Laws ch. 274, § 4 (accessories after fact); Minn. Stat. Ann. § 609.495 (aiding an offender); Miss. Code Ann. § 97-1-5 (accessory after fact); Mo. Ann. Stat. § 575.020 (concealing an offense); *id.* § 575.030 (hindering prosecution); Mont. Code Ann. § 45-7-305 (compounding a felony); Neb. Rev. Stat. Ann. § 28-204 (accessory to felony); Nev. Rev. Stat. Ann. § 195.030 (accessories); N.H. Rev. Stat. Ann. § 642:3 (hindering apprehension or prosecution); N.J. Stat. Ann. § 2C:29-3 (hindering apprehension or prosecution); N.M. Stat. Ann. § 30-22-4 (harboring or aiding a felon); N.Y. Penal Law § 205-50 (hindering prosecution); N.C. Gen. Stat. § 14-7 (accessories after the fact); N.D. Cent. Code § 12.1-08-03 (hindering law enforcement); Ohio Rev. Code Ann. § 2921.32 (obstructing justice); Okla. Stat. Ann. tit. 21, § 173 (accessories); Or. Rev. Stat. § 162.325 (hindering prosecution); 18 Pa. Cons. Stat. Ann. § 5105 (hindering apprehension or prosecution); R.I. Gen. Laws § 11-1-4 (harboring criminal); S.C. Code Ann. § 16-1-55 (classification of accessory crimes); S.D. Codified Laws § 22-3-5 (accessories to crime); Tenn. Code Ann. § 39-11-411 (accessories after fact); Tex. Penal Code Ann. § 38.05 (hindering apprehension or prosecution); Utah Code Ann. § 76-8-306 (obstruction of justice in criminal investigations or proceedings); Vt. Stat. Ann. tit. 13, § 5 (accessory after the fact); Va. Code Ann. § 18.2-19 (how accessories after the fact punished); Wash. Rev. Code Ann. § 9A.76.050 (rendering criminal assistance); Wis. Stat. Ann. § 946.47 (harboring or aiding felons); Wyo. Stat. Ann. § 6-5-202 (accessory after the fact). Michigan apparently has neither an accessory statute nor some kind of obstruction statute that covers accessories after the fact. Rather, accessories after the fact may be charged under Michigan Compiled Laws Annotated § 750.505, a catch-all provision for crimes not expressly covered by statute. *See People* v. *Karst*, 324 N.W.2d 526, 529 (Mich. Ct. App. 1982) ("[A]n accessory after-the-fact may be charged under M.C.L. § 750.505.").

and the District of Columbia confirms this logical conclusion.[17]

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[17] *Washington* v. *State*, 562 So. 2d 281, 283 (Ala. Crim. App. 1990) ("The history of the offense of hindering prosecution in Alabama shows that the offense has been limited to persons other than principals."); *Thiel* v. *State*, 762 P.2d 478, 486 (Alaska Ct. App. 1988) (distinguishing accomplice liability from hindering prosecution and explaining that "[c]onduct which would give rise to liability as an accessory after the fact under existing law is classified as the crime of hindering prosecution under the Code" (quotation omitted)); *State* v. *Sims*, 409 P.2d 17, 21 (Ariz. 1965) (holding that a precursor to the present hindering prosecution statute "sets up a distinct, independent offense [from the offense of the principal] for which the punishment is prescribed in the subsequent section. Such a person is not subject to punishment and prosecution as a principal . . . ." (citation omitted)); *Hopes* v. *State*, 816 S.W.2d 167, 168 (Ark. 1991) ("[A] person who was formerly an accessory after the fact is now guilty of a separate crime—hindering apprehension and prosecution."); *People* v. *Cooper*, 811 P.2d 742, 750 (Cal. 1991) (distinguishing liability of principal and aider and abettor from that of accessory after the fact); *Martinez* v. *People*, 444 P.2d 641, 643 (Colo. 1968) (en banc) ("[I]t is not true that one can be indicted as principal whose conduct is such as to make of him . . . an 'accessory after the fact.'"); *State* v. *Avila*, 613 A.2d 731, 736 & n.9 (Conn. 1992) (observing that one who offers assistance with a crime after it has occurred cannot be liable for the underlying offense under Conn. Gen. Stat. Ann. § 53a-8, but may be charged under § 53a-165 with hindering prosecution); *Williams* v. *United States*, 478 A.2d 1101, 1106 n.5 (D.C. 1984) ("[The D.C.] Code does not equate an accessory after the fact to a principal and it provides a separate penalty for the crime of accessory after the fact."); *Bowen* v. *State*, 791 So. 2d 44, 50 (Fla. Dist. Ct. App. 2001) ("[T]he crime of accessory after the fact . . . is separate and distinct from the crime committed by the principal."); *State* v. *Freeman*, 537 S.E.2d 92, 94 (Ga. 2000) ("[A]n accessory after the fact is not considered an accomplice to the underlying crime itself but is guilty of a separate, substantive offense in the nature of an obstruction of justice. The definition of hindering the apprehension of a criminal eliminates the idea of participation by a person guilty of such an offense in the perpetration of the major crime." (quotation and footnote omitted)); *State* v. *Randles*, 787 P.2d 1152, 1155 (Idaho 1990) (distinguishing accessories after the fact from accomplices, aiders and abettors, and principals), *overruled on other grounds by State* v. *Humpherys*, 8 P.3d 652 (Idaho 2000); *People* v. *Clark*, 581 N.E.2d 722, 726 (Ill. App. Ct. 1991) ("[A]n accessory after the fact . . . could be at most charged with obstruction of justice; being an accessory after the fact is not a crime in Illinois."); *Myers* v. *State*, 765 N.E.2d 663, 666 (Ind. Ct. App. 2002) ("[T]he statute no longer makes the accessory after the fact guilty of

the same crime as the principal."); *State* v. *Hustead*, 538 N.W.2d 867, 870 (Iowa Ct. App. 1995) ("An accused may not be convicted as a principal on the theory of aiding and abetting for conduct that only supports an accessory after the fact."); *State* v. *Busse*, 847 P.2d 1304, 1305 (Kan. 1993) ("[Aiding a felon] is best understood in terms of the common-law crime of accessory after the fact.... Today, by statute, most jurisdictions define the crime of accessory after the fact as a separate, distinct crime carrying a lesser punishment [than that of the principal]."); *Cissell* v. *Commonwealth*, 419 S.W.2d 555, 557 (Ky. Ct. App. 1967) ("An accessory after the fact is not an accomplice or principal ...."); *State* v. *Peterson*, 290 So. 2d 307, 308 (La. 1974) ("That the accused is indicted for the offense itself, and not charged as an accessory after the fact, irrefutably evidences that he is charged as principal."); *Tharp* v. *State*, 742 A.2d 6, 13 (Md. Ct. Spec. App. 1999) ("[A]ccessoryship after the fact is a distinct offense, separate from the principal crime."); *Commonwealth* v. *Berryman*, 268 N.E.2d 354, 356 (Mass. 1971) ("[O]ne cannot be both a principal in a crime and an accessory after the fact of the same crime."); *Karst*, 324 N.W.2d at 529 ("[I]t is clear that an accessory after-the-fact is not an aider and abettor under M.C.L. § 767.39."); *State* v. *Swanson*, 707 N.W.2d 645, 652 (Minn. 2006) ("An accessory after the fact is not an accomplice."); *In Interest of J.P.C.* v. *State*, 783 So. 2d 778, 781 (Miss. Ct. App. 2000) ("[O]ne acting in such capacity [as accessory after the fact] is not considered a principal and may not be convicted and punished as such."); *Pelton* v. *State*, 794 S.W.2d 301, 303 (Mo. Ct. App. 1990) ("[Defendant] cannot be criminally liable for [the principal's] acts merely because he aided him after the completion of the crime. ... There are other, specific crimes for which an accessory after the fact may be liable, such as concealing an offense or hindering prosecution."); *State* v. *Nordahl*, 679 P.2d 241, 244 (Mont. 1984) ("One who 'aids' an offender *after* a crime has been committed would not be punished for that crime."); *Heyen* v. *State*, 210 N.W. 165, 167 (Neb. 1926) (labeling "accessory after the fact ... a different offense" from that of the principal); *State* v. *Sullivan*, 185 A.2d 410, 415 (N.J. Super. Ct. App. Div. 1962) ("An accessory after the fact cannot be charged, or punished as the principal offender." (quotation omitted)); *People* v. *Robinson*, 457 N.Y.S.2d 347, 349 (N.Y. Sup. Ct. 1982) ("He was an accessory after the fact who cannot be convicted as a principal because his intent was formed and his act done after the underlying crime had been completed." (citation omitted)); *State* v. *McIntosh*, 133 S.E.2d 652, 655 (N.C. 1963) (distinguishing the crime of accessory after the fact from the underlying offense and finding that accessory after the fact is "a substantive crime—not a lesser degree of the principal crime"); *State* v. *Shepard*, 277 N.W. 315, 320 (N.D. 1937) ("Being an accessory after the fact (if he had guilty knowledge) would not be sufficient to convict [the defendant] of the principal offense ...."); *State* v. *Parker*, No. 04 CO 44, 2005 WL 3489875, at *4 (Ohio Ct. App. Dec. 16, 2005) ("We also note that even an accessory after-the-fact or an obstructor

Federal statutes and case law reflect the same approach. Section 2 of Title 18 of the United States Code sets forth those liable as principal—a list that includes one who

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of justice under R.C. 2921.32 is not considered an alleged accomplice for purposes of R.C. 2923.03(D)."); *State* v. *Truesdell*, 620 P.2d 427, 428 (Okla. Crim. App. 1980) ("[A]ll parties to a crime are either principals or accessories after the fact. . . . Thus, the crime of accessory after the fact is a separate and distinct crime, standing on its own particular elements."); *State* v. *Stevenson*, 465 P.2d 720, 721-722 (Or. Ct. App. 1970) ("[T]he rule in Oregon and the majority rule throughout the country is that accessory after the fact is a distinct crime requiring an indictment separate from one charging participation as a principal."); *Commonwealth* v. *Spence*, 627 A.2d 1176, 1183 (Pa. 1993) ("An accessory after the fact is not an accomplice."); *State* v. *Collins*, 495 S.E.2d 202, 204-205 (S.C. 1998) (observing that a person present at a felony but not an aider and abettor would not "qualify" as a principal, but "may become" an accessory after the fact by aiding the principal's escape); *State* v. *Bradley*, 431 N.W.2d 317, 322 (S.D. 1988) ("On this record, [defendant] was, at most, an accessory after the fact: If a person after the commission of a felony, conceals or aids the offender with knowledge that he has committed a felony and with intent that he may avoid or escape from arrest, trial, conviction, or punishment, he is an accessory, but not an accomplice." (quotation omitted)); *Monts* v. *State*, 379 S.W.2d 34, 43 (Tenn. 1964) ("[A]n accessory after the fact is not subject to indictment for the offense committed by his principal; but rather he is guilty of a separate and distinct offense."); *Medrano* v. *State*, 658 S.W.2d 787, 791-792 (Tex. App. 1983) ("Accessory conduct is no longer recognized under Texas law as conduct making one a party. Such acts are now prohibited under Tex. Penal Code Ann. § 38.05 . . . which defines a separate and distinct crime of 'hindering apprehension or prosecution.'" (citation omitted)); *State* v. *Ervin*, 451 P.2d 372, 373 n.1 (Utah 1969) ("In this state all accessories are principals except accessory after the fact."); *State* v. *Burnett*, 225 P.2d 416, 418 (Wash. 1951) ("The trial court correctly charged the jury as to the meaning of 'aiding or abetting', as to the distinction between aiding or abetting and being an accessory after the fact, and that [defendant] was not guilty of the crime charged, even though he aided [the principal] in leaving the scene, if he, [defendant], had in no way participated in the attempted robbery." (citations omitted)); *State* v. *Rundle*, 500 N.W.2d 916, 925 (Wis. 1993) (quoting the first edition of LaFave's Substantive Criminal Law treatise for the proposition that "the accessory after the fact is not deemed a participant in the felony" and has "remained distinct" from the other categories); *Jahnke* v. *State*, 692 P.2d 911, 921 n.3 (Wyo. 1984) ("The statutory scheme of treating accessories after the fact as committing a separate offense and all other parties as principals has carried over into the revised Wyoming Criminal Code of 1982.").

"aids" and "abets" but does not include accessories after the fact in name or in substance. A separate section, entitled "accessory after the fact," addresses the liability and punishment of accessories after the fact and in no way suggests that accessories after the fact are also within the purview of § 2. 18 U.S.C. § 3. And this Court has confirmed that accessories after the fact are not liable as principals: "While § 332 [now § 2] of the Criminal Code . . . made aiders and abettors of an offense principals, Congress has not made accessories after the fact principals." *Bollenbach* v. *United States*, 326 U.S. 607, 611 (1946).[18] Rather than being liable for the underlying offense of the principal, "[t]heir offense is distinct and is differently punished." *Id.*

Additionally, the theft statutes of the fifty states and the District of Columbia in no way suggest that an accessory after the fact should be liable as principal for the underlying theft.[19] Specifically, in describing the general theft offense (or comparable offense in the absence of a general theft offense), the state statutes neither reach accessories after the fact explicitly nor appear to cover the conduct of one who acts only after the commission of the crime.[20]

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[18] *See also United States* v. *Varelli*, 407 F.2d 735, 749 (7th Cir. 1969) (holding that the defendants were "accessories after the fact and cannot be made principals under [18 U.S.C.] § 2").

[19] Although respondent has not assessed every federal theft-related offense, several basic federal theft-related laws likewise do not reference accessories after the fact or reach the conduct of an accessory after the fact. *See, e.g.*, 18 U.S.C. § 641 (theft of government money, property, and records statute, including no reference to accessories after the fact and not covering conduct of an accessory after the fact).

[20] The code provisions are for the general theft offense except as noted. Ala. Code § 13A-8-2 (theft of property); Alaska Stat. § 11.46.100; Ariz. Rev. Stat. Ann. § 13-1802; Ark. Code Ann. § 5-36-103 (theft of property); Cal. Penal Code § 484; Colo. Rev. Stat. § 18-4-401; Conn. Gen. Stat. Ann. § 53a-119 (larceny); Del. Code Ann. tit. 11, § 841; D.C. Code § 22-3211; Fla. Stat. Ann. § 812.014; Ga. Code Ann. § 16-8-2 (theft by taking); Haw. Rev. Stat. § 708-830; Idaho Code Ann. § 18-2403; 720 Ill. Comp. Stat. Ann. 5/16-1; Ind. Code Ann. § 35-43-4-2; Iowa Code Ann. § 714.1; Kan. Stat. Ann. § 21-3701; Ky. Rev. Stat. Ann. § 514.030 (theft by unlawful tak-

Indeed, the Government's own logic supports respondent's argument. The Government asserts that all state criminal codes include aiding and abetting in the definition of theft. Pet. 7. This argument—unsupported by any citations—appears mainly to be a logical outgrowth of the statutes defining who may be liable as principal.[21] The same logic, however, leads to the parallel conclusion that accessories after the fact are *not* liable for the underlying theft.[22]

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ing or disposition); La. Rev. Stat. Ann. § 14:67; Me. Rev. Stat. Ann. tit. 17-A, § 353 (theft by unauthorized taking or transfer); Md. Code Ann., Crim. Law § 7-104; Mass. Gen. Laws ch. 266, § 30 (larceny); Mich. Comp. Laws Ann. § 750.356 (larceny); Minn. Stat. Ann. § 609.52; Miss. Code Ann. § 97-17-41 (grand larceny); Mo. Ann. Stat. § 570.030 (stealing); Mont. Code Ann. § 45-6-301; Neb. Rev. Stat. Ann. § 28-511 (theft by unlawful taking or disposition); Nev. Rev. Stat. Ann. § 205.0832; N.H. Rev. Stat. Ann. § 637:3 (theft by unauthorized taking or transfer); N.J. Stat. Ann. § 2C:20-3 (theft by unlawful taking or disposition); N.M. Stat. Ann. § 30-16-1 (larceny); N.Y. Penal Law § 155.05 (larceny); N.C. Gen. Stat. § 14-72 (larceny of property); N.D. Cent. Code § 12.1-23-02 (theft of property); Ohio Rev. Code Ann. § 2913.02; Okla. Stat. Ann. tit. 21, § 1701 (larceny); Or. Rev. Stat. § 164.015; 18 Pa. Cons. Stat. Ann. § 3921 (theft by unlawful taking or disposition); R.I. Gen. Laws § 11-41-1 (stealing as larceny); S.C. Code Ann. § 16-13-30 (petit larceny; grand larceny); S.D. Codified Laws § 22-30A-1; Tenn. Code Ann. § 39-14-103 (theft of property); Tex. Penal Code Ann. § 31.03; Utah Code Ann. § 76-6-404; Vt. Stat. Ann. tit. 13, § 2501 (grand larceny); Va. Code Ann. § 18.2-95 (grand larceny); Wash. Rev. Code Ann. § 9A.56.020; W. Va. Code Ann. § 61-3-13 (grand and petit larceny distinguished); Wis. Stat. Ann. § 943.20; Wyo. Stat. Ann. § 6-3-403 (wrongful taking or disposing or property).

[21] The Government similarly asserts, again without any supporting authority, that "every substantive criminal offense" covers aiding and abetting. Pet. 7. Respondent does not purport to have reviewed the underlying statutes of "every substantive criminal offense." But, again, the distinct status of accessories after the fact supports the proposition that, with the exception of statutes expressly covering accessories after the fact, such as California Vehicle Code § 10851(a), substantive criminal offenses do not reach accessories after the fact.

[22] As noted at the outset, the INA includes "receipt of stolen property" as a "theft offense." 8 U.S.C. § 1101(a)(43)(G). And state laws do impose criminal liability for the receipt of stolen property. *See, e.g.*, Ark. Code Ann. § 5-36-106 (theft by receiving). Such statutes do not alter the analysis—they do not suggest that California Vehicle Code § 10851(a) falls

Furthermore, the BIA has recognized the distinction in the offense conduct and liability of accessories after the fact and principals. In *Matter of Batista-Hernandez*, 21 I. & N. Dec. 955, 960 (BIA 1997), the BIA held that a conviction for accessory after the fact for assisting a drug trafficker "insufficiently relates to [the principal's] underlying drug-trafficking crime" to support a finding of deportability. As the BIA explained:

> While courts treat a person who aids and abets others as an additional party to the substantive crime, one who is an accessory after the fact, like an individual guilty of misprision, has been found to have committed a separate and distinct crime from the substantive offense committed by the principal.

Id. at 959.[23]

Because under the laws of the fifty states, the District of Columbia, and the federal government, accessories after the fact are neither treated as principals nor covered by the theft statutes, the generic definition of "theft offense" can-

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within the generic definition of "theft offense." As an initial matter, one who receives stolen goods is not necessarily an accessory after the fact. *See* 2 LaFave § 13.6(a) ("Because aid must be to the felon personally, one does not become an accessory after the fact by, for example, receiving and concealing what are known to be stolen goods." (citing cases)). Moreover, accessories after the fact to the theft need not receive stolen goods. For example, if the principal happens upon another when making his escape, and that other individual assists the principal in evading the police, the individual would be an accessory after the fact even if he was not given the fruits of the crime. Accordingly, the inclusion of receipt of stolen property within "theft offense" does not bring accessory after the fact liability under § 10851(a) within the scope of the generic definition.

[23] *Batista-Hernandez* went on to hold that the respondent was deportable because the conviction under 18 U.S.C. § 3 qualified as an "offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year" and thus an aggravated felony under § 101(a)(43)(S) of the INA, 8 U.S.C. § 1101(a)(43)(S). 21 I. & N. Dec. at 961. The question whether respondent's conviction under California Vehicle Code § 10851(a) falls within the scope of § 1101(a)(43)(S) is not before the Court.

not be deemed to reach accessories after the fact. In turn, because the California statute at issue here, California Vehicle Code § 10851(a), reaches accessories after the fact, this statute covers conduct not encompassed within the generic definition of "theft offense." Accordingly, the ultimate holding in *Penuliar* is correct—§ 10851(a) does not qualify as a categorical "theft offense" under the INA.

IV. THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI IN LIGHT OF THE NINTH CIRCUIT'S EN BANC REVIEW IN *VIDAL*

Even if this Court shares the Government's approach to and views of the issues in this case and *Penuliar*, certiorari is not warranted in light of the Ninth Circuit's decision—issued after the Government submitted its petitions for writs of certiorari in this case and *Penuliar*—to review en banc the panel decision in *Vidal*.[24]

A. *Vidal* Addresses The Scope Of California Vehicle Code § 10851(a)

The legal issues of *Vidal*, the instant case, and *Penuliar* are closely related. All three cases involve the interpreta-

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[24] The Government goes on at length (Pet. 15-21) regarding the "substantial effect on the administration of the immigration laws" that the decision in *Penuliar* will have if left unreviewed. The Government notes that the Ninth Circuit has remanded several cases in light of *Penuliar*. Pet. 16. The remainder of the Government's arguments, however, vary from the highly speculative to the highly unlikely. It hints that no alien convicted of a theft offense will ever be deported because the Government will not be able to show a conviction of a theft offense under the modified approach. Pet. 18. Then it suggests that the Ninth Circuit "may well" extend its holding to crimes of moral turpitude and, indeed, to "every crime that is a basis for removal." Pet. 20. These arguments reflect a fair amount of creativity as well as the Government's misunderstanding of the decision in *Penuliar*. *Penuliar*'s "logical" conclusion extends only so far as statutes that include liability for accessories after the fact—an extension that is both logical and correct, for the reasons stated above. In any event, the actual and imagined consequences will depend in large part on the outcome in *Vidal*; that case may remedy or avoid the concerns of the Government.

tion of the same California statute—California Vehicle Code § 10851(a). All three cases involve the application of the *Taylor* framework to determine whether a conviction under this statute constitutes a "theft offense." And while *Vidal* raises this question in the context of the Sentencing Guidelines rather than the INA, the issues addressed in the cases overlap in substantial part.

The question in *Vidal* was whether Vidal's conviction under § 10851(a) was a "theft offense" that would justify a sentence enhancement as an "aggravated felony" under U.S.S.G § 2L.1(b)(1)(C). 426 F.3d at 1014. With respect to the first step of the *Taylor* framework, Vidal contended that § 10851 is overly broad because it covers convictions based on aiding and abetting liability.[25] The Ninth Circuit rejected this view, citing the 2001 amendments to the Guidelines. *Id.* at 1015. The Application Note states that "[p]rior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses." U.S.S.G. § 2L1.2, cmt. n.4 (2002). And the court found that "this commentary governs Vidal's sentence." 426 F.3d at 1015. The Ninth Circuit distinguished *Penuliar*, which Vidal had relied upon for support, on the ground that it did not consider the commentary to U.S.S.G. § 2L1.2.[26] *See id.*

The court declined to address Vidal's argument that "aiding and abetting liability for federal sentencing purposes does not cover accessories to criminal conduct who act after

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[25] Vidal also argued that the state statute covered intent to make a temporary or de minimis deprivation while the Model Penal Code approach requires a permanent or extended deprivation. The court rejected that view of the generic definition, noting that it has adopted the Seventh Circuit's definition of "theft offense," which includes deprivations "less than total or permanent." 426 F.3d at 1014 (quotation omitted).

[26] The court also rejected Vidal's argument that "California aiding and abetting liability is broader than federal aiding and abetting liability." 426 F.3d at 1015. In the court's view, "California aiding and abetting liability requires proof of all elements contained in the federal definition." *Id.* at 1016.

the commission of the prohibited act." 426 F.3d at 1016. The court held that this "point is neither developed, nor would it make any difference in this case because ... Vidal pled guilty to *taking* the car." *Id.* (emphasis in original). The court thus concluded that conviction under California Vehicle Code § 10851(a) did constitute a "theft offense" and that, regardless, Vidal's conviction plainly qualified under the modified categorical approach. *See id.* at 1017.

As noted above, *supra* Part I.B, Judge Browning dissented on the ground that the court "fails to address adequately" Vidal's argument that § 10851(a) is broader than the generic definition of theft offense because it criminalizes accessories, and "in doing so reaches an erroneous conclusion." 426 F.3d at 1018 (Browning, J., concurring in part and dissenting in part). Specifically, Judge Browning found that California retained the distinction between accessories after the fact and principals, that § 10851(a) reaches accessories after the fact, and that the Sentencing Guidelines and accompanying commentary did not address accessories after the fact. Thus, he concluded, § 10851(a) reaches beyond the generic definition of "theft offense" and is not a categorical aggravated felony under the Guidelines.

Vidal sought panel rehearing and rehearing en banc. The Ninth Circuit granted en banc review on June 26, 2006, and oral argument will be held on October 5, 2006.

B. En Banc Review In *Vidal* Renders Supreme Court Review Premature

En banc review in *Vidal* will entail reconsideration of the scope of § 10851(a) relative to the generic definition of "theft offense." The majority and dissenting opinions in *Vidal* reveal two sorts of disagreements, both of which the en banc court will have an opportunity to reconcile. First, the *Vidal* opinions reflect disagreement on the underlying question whether § 10851(a) is a categorical "theft offense." Second, the opinions' use of precedent suggests conflicting views about the import of Ninth Circuit case law, including *Penuliar*, on this issue.

As relevant to *Penuliar* and this case, the en banc court appears primed to consider the importance of California Vehicle Code's § 10851(a)'s inclusion of accessory liability as well as the scope of aiding and abetting liability under California law. And the court likewise appears ready to address the question presented by the Government—whether the generic definition reaches aiding and abetting.[27]

The disagreement within the *Vidal* panel as well as the grant of en banc review suggest that the Ninth Circuit has not yet come to rest on the interpretation and breadth of § 10851(a). In such circumstances, Supreme Court review would be premature; the Ninth Circuit is in the process of considering and reconsidering the issues at stake in *Vidal*, *Penuliar*, and the instant case.[28]

CONCLUSION

This Court should deny the petition for writ of certiorari.

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[27] Although the aiding and abetting question arises in context of the Sentencing Guidelines in *Vidal*, an en banc decision in *Vidal* may well offer guidance for cases addressing the aiding and abetting question under the INA. Even if the en banc court's holding with respect to aiding and abetting liability is tied to the Sentencing Guidelines and has no bearing on cases addressing the INA, the court seems likely to address the other issues that offer alternate grounds for affirmance in this case and would not be tied to the Sentencing Guidelines.

[28] Finally, as the Government notes (Pet. 21-22) Congress has been considering legislation that would explicitly include liability for aiding and abetting within the definition of "aggravated felony." *See* Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong., § 201(a)(3) (passed Dec. 16, 2005); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong., § 203(a)(5) (passed May 25, 2006). Thus, any confusion in the courts over the question of interest to the Government may be cleared up through the legislative process, suggesting another reason that this case does not warrant certiorari.

Respectfully submitted,

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